PART IV

(Rule 40 (1) (d) (1))

Statement of Question Presented

Is Georgia Code Title 46 Section 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

PART V

(Rule 40 (1) (e))

Statement of Facts

PREFACE

Petitioner, NORTH GEORGIA FINISHING, INC., will for brevity, be referred to hereinafter as NGF; Respondent, DI-CHEM, INC., will likewise be referred to hereinafter as DI-CHEM; and Garnishee, FIRST NATIONAL BANK OF DALTON, will be referred to as FNB DALTON. Parentheticals (# #) will refer to page number of the technical record of case Appendix A, all of which has been included by agreement of the parties.

On Friday, August 20, 1971, DI-CHEM filed Civil Action No. 8626 in the Superior Court of Whitfield County, Georgia, alleging an unverified and unliquidated open account indebtedness due and owing by NGF. This indebtedness has been and presently is in dispute. Also on August 20, 1971, immediately after filing its case in chief and prior to the service thereof or other notice of its pendency and prior to any resolution or hearing therein, DI-CHEM also filed and caused the Clerk of the Superior Court of Whitfield County, Georgia, to issue a separate garnishment action *pendente lite* naming FNB DALTON as Garnishee (A 3).

The garnishment action was instituted under the authority of the Clerk of the Superior Court of Whitfield County, Georgia (A 3). In Georgia, Clerks of Superior Courts are not judicial officers and are not required to have

legal training and do not have authority to exercise any discretionary function.[1]

The garnishment action was served by a Deputy Sheriff of Whitfield County, Georgia on August 20, 1971, the same date filed (A 8).

The garnishment action was based upon the printed form conclusory statement:

> "... Affiant has reason to apprehend the loss of said sum or some part thereof unless process of garnishment issues."

No other facts are stated in the affidavit except the amount of the claim and that an indebtedness was owing upon a suit pending. No judicial officer conducted any independent investigation into the grounds for the issuance of the garnishment writ, nor is there any record of a factual presentation having been required or made.

NGF had on deposit with FNB DALTON at the time of summons of garnishment, a certain sum of money which constituted its payroll account. The effect of the garnishment action was to freeze whatever sums NGF had on deposit with the bank at that time. Upon service, FNB DALTON rejected all weekly payroll and other presented checks of NGF and created a serious labor crisis for NGF and further caused NGF credit embarrassment with its material suppliers. NGF brought cash from another source as soon as possible and in effect "banked" their own employees' checks by cashing them. On the following Monday, August 23, 1971, as soon as the Courthouse opened for regular business, NGF

1Georgia Code Title 24 Chapter 2701 et seq.

and its security posted bond not only for the purpose of freeing its bank account but also for the purpose of creating standing[2] in the Georgia Courts to attack the procedure followed in the issuance of the writ.

[2]The Georgia Courts do not consider any person, firm or corporation, such as NGF, to have any standing whatsoever to complain of the issuance of garnishment as above until bond has been made. Until such bond is made the Georgia Courts hold that the action pends between the plaintiff and the garnishee only, and the Courts will not hear any attack from the defendant. *Jackson v. Barksdale*, 17 Ga. App. 461, Case No. 2 (1915); *Powell v. Powell*, 95 Ga. App. 122 (1957).

PART VI

(Rule 40 (1) (g))

ARGUMENT AND CITATION OF AUTHORITY

At the outset, NGF acknowledges that it does not contest the constitutionality of the substance or procedure of any post judgment garnishment as might be provided by the Georgia statutory scheme for garnishment. What is contested and presented to this Court for determination is the constitutionality of the issuance of garnishment *pendente lite* by a non-judicial officer, without judicial inquiry, without any showing of fact provided or made and without any notice or hearing prior to the issuance of garnishment or, in the alternative, some procedure for immediate hearing and relief after issuance.

The issue before this Court, as stated, is governed by the Fourteenth Amendment to the United States Constitution, specifically the "due process" clause thereof, as it has been interpreted by *Sniadach v. Family Finance Corporation of Bay View, et al*, 395 U.S. 337 (1969) and its prodigy. As this Court has prudently observed, the rulings of the *Sniadach, supra*, decision are well established in the legal foundations of the common law and do not alter the prior law.[3] *Sniadach* reaffirmed and acknowledged the basic principles of "due process" by requiring notice and prior hearing before prejudgment garnishment of an individual's wages. In so rul-

[3]The United States Supreme Court has long recognized the exception that summary seizure procedure may well meet the requirements of due process in *extraordinary situations. Faugby v. Mallonee*, 332 U.S. 245 (1947); *Ewing v. Mytinger and Casselberry*, 339 U.S. 594 (1950).

ing, the Wisconsin prejudgment garnishment statute was declared unconstitutional for failing to comply with these "due process" standards. Although not a lengthy opinion as measured by words, Justice Douglas' statements in the *Sniadach* decision readily settled the issue of notice and hearing in cases of this nature.

To date the most important case to be spawned by *Sniadach* undoubtedly is *Fuentes v. Shevin*, 407 U.S. 67 (1972) in which the Court took the opportunity to expound on the ramifications of its earlier opinion. Justice Stewart, writing for the majority, developed an in-depth review of the law on "due process" rights before deprivation of property. In *Fuentes, supra*, the Court confronted the issue of the constitutionality of the Florida Prejudgment Replevin Statutes which allowed a private party, without a hearing or prior notice to the other party, to obtain a writ of replevin upon an *ex parte* application to an official of the state—*a clerk of court*—and upon posting a bond in an amount double the value of the property to be taken. Upon delivery of the writ of replevin to the Sheriff he was required by Florida law to seize the property described therein. Thereafter, the defendant had the right to reclaim possession of that property by posting his own security bond for double the value of the property. In ruling as it did, this Court recognized that *Sniadach* was not an action that was limited and confined to the singular question of prejudgment garnishment of wages or other such necessities. This Court observed the contrary to be true. In the now familiar quote of *Fuentes, supra*, the Court stated the breadth of its ruling, to-wit:

> "No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods.

> Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary'."

In further progression of the implication of "due process" rights, this Court recently published its decision in the case of *Mitchell v. W. T. Grant Company*, 42 L.W. 4671 (May 13, 1974). In distinguishing the constitutionality of the Louisiana sequestration procedure for securing property from those of Wisconsin and Florida, dealt with in *Sniadach, supra*, and *Fuentes, supra*, it stated ". . . we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us. . ."

In the *Mitchell, supra*, decision, the Louisiana Code of Civil Procedure made available to a mortgagee or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. The writ was issued under the authority of a *judge* in Orleans Parish and would be issued only when the nature of the claim, the amount, and the grounds relied upon for the issuance of the writ clearly appeared from *specific facts shown by a verified petition* or affidavit and a sufficient bond was filed by the creditor. Moreover, *the statute entitled the debtor immediately to seek dissolution of the writ*, which must be ordered unless the *creditor proves the grounds upon which the writ issued*. Alternate-

ly, if he should so choose, the debtor, with or without moving to dissolve the sequestration, could regain possession by filing his own bond to protect the creditor.

The primary distinctions between the Louisiana statute and the other statutes considered in *Fuentes* and *Sniadach* were discussed at length. Summarized they are:

1. Under the Louisiana procedure, *the writ of sequestration would not issue on the conclusory allegations of ownership or possessory rights as was the situation under the Florida law*. A higher standard was required which necessitated the verified petition to state the claim, the amount, and the specific facts surrounding the grounds for the claim.

2. Furthermore, in *Fuentes, supra*, the writ was issued by the Clerk of the Court; however, under the Louisiana law reviewed in *Mitchell, supra*, the writ would issue only by a judge.

3. The debtor in the more recent decision has the immediate right to demand dissolution of the writ and such would be granted unless the creditor proves the grounds upon which the writ was issued. No such safeguard was provided in Florida.

4. With these differences in consideration, this Court further noted that under the facts of the *Mitchell* case, *supra*, the property sequestered was not exclusively the property of the debtor.

> "The question is not whether a debtor's property may be seized by his creditors, *pendente lite*, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current,

> real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interest of the buyer of the property but those of the seller as well." *Mitchell v. W. T. Grant Company*, 42 L.W. at 4672.

Accordingly, there were at least two sets of property rights to be protected in the sequestered property. The Court balanced these opposing interests examining each in light of the safeguards written into the Louisiana Code and concluded that as prepared that legislation met all necessary constitutional due process requirements.

The Georgia statute, *sub judice*, is factually distinguishable from the code provisions in *Mitchell v. W. T. Grant Company*, *supra*, and substantially analogous to those in *Fuentes v. Shevin*, and *Sniadach v. Family Finance Corp. of Bay View*, *supra*, as viewed in the light of constitutional due process. Thus, the language of the *Mitchell*, *supra*, opinion is strong support for the proposition that the Georgia statute lacks the necessary due process requirements.

Georgia Code § 46-101 provides the basic power of prejudgment garnishment for the plaintiff of a suit pending. The statutory scheme of garnishments is found in Title 46, Georgia Code. The procedure for accomplishment of said prejudgment garnishment is outlined in Georgia Code § 46-102, § 46-103, § 46-104 and § 46-401.

An agent of Di-Chem appeared before the clerk of the Superior Court of Whitfield County, Georgia; made a conclusory affidavit that NGF was indebted to his company; and posted a bond. In Georgia, as in Florida, the clerk of the court is not a judicial officer and accordingly there was no

judicial order, approval or participation as was the situation in *Mitchell, supra*. Furthermore, . . . "there is no requirement that the applicant make a convincing showing before the seizure", *Fuentes, supra*, at pp. 73 and 74, nor in Georgia could such a showing have been made since no judicial officer's participation is required. The record reveals that the president of Di-Chem simply affirmed that "North Georgia Finishing, Inc., defendant, is indebted to said plaintiff in the sum of $51,279.17 Dollars . . . and that said plaintiff has a suit pending returnable to the Superior Court of Whitfield County" (A 3). No showing of facts supporting the alleged debt was made.[4] The Georgia law simply does not meet the standard of due process outlined in the *Mitchell* case in that in Georgia the affiant must give only conclusions, not facts, i.e., that the debtor is indebted and the amount. The Georgia law, like the Florida law, . . . "automatically relies on the base assertion of the party seeking this writ that he is entitled to one and allows a court clerk to issue the writ summarily". *Fuentes, supra*, at p. 74. As in Florida, Georgia Code § 46-102, does require that the creditor . . . "give bond, with good security, in a sum at least equal to double the amount sworn to be due". However, as so aptly noted in *Fuentes, supra*, these requirements are hardly a substitute for a prior hearing for they test no more than the strength of the creditor's own belief in his rights or the comparative financial strength of the contending parties. The bond affords the alleged debtor no suitable safeguards against arbitrary deprivation of property.

Also, a provision of the Louisiana Code on sequestration provided that the debtor may *immediately* have a full hearing

[4]Moreover, the seizure was accomplished without the slightest showing that there existed any situation which required special protection to the state or to the creditor-appellee's interest. *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticutt*, 401 U.S. 371 (1971). See also *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950).

on the matter of possession following the execution of the writ and further places the burden of establishing the right to the writ on the plaintiff. The majority of the Court concluded that this was a significant safeguard of due process rights that was not available under the Florida law and observed "Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued' . . . Act. 3506," *Mitchell, supra*, at p. 4677. This procedure enables the debtor to contest at an early date the facts as sworn by the creditor in his affidavit. This procedure prevents the all too common situation of having the matter suspended to wait the normal lengthy delay inherent in determining the merits of the case in chief. Georgia has chosen to draft its prejudgment garnishment legislation in such a manner as to require no hearing at any time on the right of garnishment but to require the parties to confront each other only in the posting of bonds. The importance of the hearing provision is strongly emphasized by this Court in *Mitchell, supra*, and the protection was afforded the defendant appears to be primary in the Court's decision to sustain the questioned procedure.

Notwithstanding the general Georgia statutory provisions provided for testing the sufficiency of pleadings, *Georgia Code Chapter* 81*A*, *Civil Practice Act*[5], there are no statutory provisions in Georgia for the dissolution of the writ of garnishment upon a showing of fact. There is no statutory method to determine upon what facts the conclusions of the affidavit are based. Further as noted in the statement of facts herein there is no provision for a hearing of any kind

[5]The Civil Practice Act of Georgia is in substantial accord with the Federal Rules of Civil Procedure. Specifically, Georgia Code Title 81A §112 provides for a motion for more definite statement and a motion to strike.

until bond is made. Thus, under the Georgia statutory scheme, NGF and others similarly situated are deprived of the use of property for an undeterminate length of time.

It should be noted that in the case *sub judice* the creditor had no interest whatsoever in the garnished property, i.e., the bank account of NGF. As would appear to be the fact situation, similar to *Sniadach, supra*, on this point, Di-Chem had no lien, mortgage, security interest, or property right in the bank account funds. The necessity of protecting the interest of all parties was a strong influence in the *Mitchell* case, *supra*. In this situation, where both parties held equitable interest in the property when considered with the other procedural provisions of the Louisiana statute, the substantive rights created by the Louisiana legislature effected a constitutional accommodation of the conflicting rights of the parties.

NGF is a corporate entity and was engaged at the time of the institution of this action in the dyeing and finishing of rugs and carpets for various manufacturers, and as such is no different from any other corporate or individual person engaged in commerce in that it occupied a dual role, that is to say, the role of creditor to some and debtor to others. Accordingly, NGF readily acknowledges that some statutory provision is necessary to effect a constitutional accommodation of the conflicting interests of debtor and creditor. NGF recognizes that there must be a constitutional and legal method for determining and collecting accounts, and that there must be a constitutional and legal method of disputing the same and resolving these disputes within a framework of fundamental fairness and due process which this Court has held the Louisiana statute to provide.

Further, contradistinguishing the instant case from the

Mitchell case, we note that the Court is not presented a fact situation here wherein the debtor has any property interest whatsoever in the sequestered bank account of NGF. As a means of emphasis, it should be noted that funds of NGF bank account were to be used for payment of the wages of its employees. This Court has continuously recognized the singular nature of this type of property and has required reasonable adherence to due process standards when it is in question.

Lastly, the petitioner desires to emphasize that, although this review was granted on its petition for writ of certiorari to the Georgia State Supreme Court which upheld the consitutionality of the Georgia Code § 46-101, this same statute has been most recently declared unconstitutional by a United States Three-Judge District Court. In *Morrow Electric Co., Inc. v. Harold R. Cruse, et al*, Civil Action No. 19008 (N.D. Ga., January 28, 1974) (opinion supplied the Court in Petitioner's Supplemental Brief to Writ of Certiorari), the Court had before it the identical issue as that which the Supreme Court of the State of Georgia had ruled upon only three months before in the instant case. Although aware of this point, and noting the same in its opinion, the District Court pointed out that the Georgia Supreme Court's opinion had not even mentioned the *Fuentes* decision, *supra*, and had concluded that *Sniadach, supra*, was no more than the exception of one limited area, i.e. wages, from prejudgment seizure.

In *Morrow Electric Co., supra*, the facts were very similar to those in review here since a bank account was the subject of the garnishment in both. Noting that a bank account was involved, the District Court opined, "Furthermore, it is not clear that all the equities in this case are on the side of the defendant. The economic impact of even a temporary deprivation of the bank account in question could be quite

severe should it result in the seizure of the plaintiff's operating assets". Further, the Court noted with interest *Aaron v. Clark*, 342 F. Supp. 898 (N.D. Ga., May 4, 1973) which had earlier considered the Georgia authority to garnish a bank account which contained funds set aside for college tuition. That Three-Judge District Court, relying upon *Sniadach, supra*, before this Court had delivered the *Fuentes* decision, concluded that the Ga. Code § 46-101 was unconstitutional as applied to the above facts; however, it did limit its holding to the particular type funds deposited in the bank account, i.e., college tuition.

Petitioner, NGF, is in complete agreement with the District Court that it is unfair and constitutionally prohibited to economically bludgeon an alleged debtor into payment or settlement of an account by depriving that debtor of the means of existence or of the very means of protesting and asserting his rights or the means with which to pay and settle an account free of economic coercion without some minimum notice and hearing.

Furthermore, as noted in *Morrow, supra*, the Supreme Court of Georgia erred in ignoring the holding of this Court in *Fuentes, supra*, to the effect that the deprivation of the *use* of property is the deprivation of a function of that property which is constitutionally protected by the Fourteenth Amendment. The Supreme Court of Georgia, in strained reasoning, disregarding the *Fuentes* decision, held in effect that NGF had not been deprived of anything by State action and that title to the funds in the bank had not been transferred by the garnishment but merely sequestered. The Georgia Court analogized this to a *"lis pendens"* pending the outcome of the case in chief.

But as stated in *Fuentes*:

> "The Fourteenth Amendment's protection of "property' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest' ".

This is particularly true of an asset such as money or bank accounts. Money, currency or a bank account in and of itself is of no value. These forms of property cannot be worn, eaten or processed into manufactured goods. Their purpose and reason for existence lies only in their use so that they may be used, exchanged and converted into food, clothing, manufactured goods and other essentials of life and commerce. Nor is the Supreme Court of Georgia correct when it holds that garnishment is analogous to *lis pendens*. In the typical Georgia *lis pendens* situation, a claim is made by one holding an equitable interest in the property sought to be sequestered. *J. W. B. Edwards v. Ellison Banksmith and James H. Mulford*, 35 Ga. 213. In Georgia, *lis pendens* cannot be asserted by one to attach property in which the assertor has no equitable claim of title. *Watson v. Whatley*, 218 Ga. 86. Further, pending determination of the typical Georgia case wherein *lis pendens* is filed, usually against real estate, the person in possession of that property is permitted to retain and to continue to use the same. *Burkhalter, et al v. Glennville Bank*, 184 Ga. 147.

The Supreme Court of Georgia in choosing not to rely upon *Fuentes v. Shevin, supra*, relied upon *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150, (U.S.D.C. Hawaii, 1970); notwithstanding the fact that the Supreme Court of Hawaii in a prejudgment garnishment case upon a bank account closely analogous to the case *sub judice* had reached

the opposite conclusion in *Brunswick Corporation v. Galaxy Cocktail Lounge, Inc.*, et al, 513 P. 2nd 1390.

The Supreme Court of Hawaii stated in a footnote in the *Brunswick Case, supra*:

> "We are, of course, mindful of contrary decisions regarding bank accounts, especially *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150, (D. Hawaii 1970). This case, however, preceded the Supreme Court's clarification in *Fuentes*."

The Hawaii Supreme Court further observed that the U. S. District Court's judgment in *American Olean Tile Co., supra*, specifically deferred to the legislature of Hawaii and previous decisions of the Hawaii Supreme Court, all of which predated *Fuentes*.

PART VII

(Rule 40 (1) (h))

CONCLUSION

Petitioner respectfully submits that the Georgia statutory scheme of prejudgment garnishment is violative of the due process provision of the Fourteenth Amendment of the United States Constitution in that it does not provide for hearing and prior notice. Specifically, the Georgia law is lacking in that it fails to provide reasonable safeguards such as *judicial controls, showing of specific facts in the affidavit,* and the *right to a hearing* either prior to or immediately after the garnishment issues. Further, the property in question in the instant case is solely owned and titled in the petitioner without the barest property interest in the respondent.

Thus, following the enlightened decisions of this Honorable Court in *Sniadach, supra, Fuentes, supra,* and *Mitchell, supra,* the Georgia garnishment statute should be declared unconstitutional in its prejudgment application.

PART VIII

STATEMENT OF CASES AND STATUTES CITED

Aaron v. Clark,
342 F. Supp. 898 (N.D. Ga. 1973)

American Olean Tile Company v. Ralph E. Zimmerman, Jr.,
317 F. Supp. 150 (D. Hawaii, 1970)

Bell v. Burson,
402 U.S. 535 (1971)

Boddie v. Connecticutt,
401 U.S. 371 (1971)

Ewing v. Mytinger and Casselberry,
339 U.S. 594 (1950)

Faughy v. Mallonee,
332 U.S. 245 (1950)

Fourteenth Amendment, U. S. Constitution

Georgia Code § 24-2701, *et seq.*

Georgia Code § 46-101

Georgia Code § 46-102

Georgia Code § 46-103

Georgia Code § 46-104

Georgia Code § 46-401

Georgia Code § 81A-112

Jackson v. Barksdale,
17 Ga. App. 461 (1915)

J. W. B. Edwards v. Ellison Banksmith and James H. Mulford, 35 Ga. 213 (1866)

Mitchell v. W. T. Grant Company,
42 L.W. 4671 (May 13, 1974)

Morrow Electric Co., Inc. v. Harold R. Cruse,
Civil Action No. 19008 (N.D. Ga., January 24, 1974)

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950)

Powell v. Powell,
95 Ga. App. 122 (1957)

Watson v. Whatley,
218 Ga. 86 (1962)

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, WARREN N. COPPEDGE, JR., Attorney for Petitioner, North Georgia Finishing, Inc., in Case No. 73-1121, October Term, 1973, in the Supreme Court of the United States, against Di-Chem, Inc., Respondent, and First National Bank of Dalton, Garnishee, do hereby swear that on this the 9th day of July, 1974, I served a copy of the foregoing Brief of Petitioner together with Appendix thereto on Di-Chem, Inc., Respondent, and First National Bank of Dalton, Garnishee, by mailing three copies of the foregoing Brief and Appendix to their counsel of record, H. E. Kinney, Esq., Pittman, Kinney, Kemp, Pickell & Avrett, P. O. Box 398, Dalton, Georgia 30720, of counsel for Respondent, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle, P. O. Box 1105, Dalton, Georgia 30720, of counsel for the Garnishee.

Warren N. Coppedge, Jr.

WARREN N. COPPEDGE, JR.
ATTORNEY FOR PETITIONER

Sworn to and subscribed before me,
this the 9th day of July, 1974:

Kaye C. Jordan

NOTARY PUBLIC, GA. STATE AT LARGE